



Neutral Citation: [2023] UKFTT 627 (TC)

Case Number: TC08865

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

London

Appeal reference: TC/2014/00080

VAT – exemption – whether evidence sufficient to conclude that clinic services were medical care – no – appeal dismissed

Heard on: 6 February 2023
Judgment date: 12 July 2023

Before

TRIBUNAL JUDGE ANNE FAIRPO

Between

EPEM LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr M Shiell, director

For the Respondents: Mrs MacIntyre, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

Introduction

1. This is an appeal against HMRC's decision to compulsorily register the appellant (Epem) from VAT with effect from 1 August 2007 on the basis that Epem was making standard rated supplies in excess of the VAT threshold. Epem contends that it is providing exempt medical services, such that it has never exceeded the VAT registration threshold.

Background

2. The history of this appeal is, in brief, as follows. HMRC wrote to Epem on 6 July 2009 to establish their VAT status. In September 2009, Epem advised that it provided medical services which were not subject to VAT, as these were provided by qualified and trained professionals in a medical centre. The types of services were the treatment of skin conditions, removal of skin lesions and the use of medical devices for the treatment of skin conditions, and the treatment of varicose veins.

3. HMRC requested a breakdown of the services provided over the previous three years, but this was not provided despite repeated requests. HMRC advised Epem that, if this was not provided by 13 August 2010, the company would be compulsorily registered, and VAT and penalty assessments would be issued. As no response was received, HMRC compulsorily registered Epem on 18 August 2010.

4. Epem requested a review of this decision; on 10 November 2010, the review upheld the decision to register Epem.

5. Epem subsequently submitted nil returns for the periods 02/11 to 08/12. On 15 May 2013 HMRC visited Epem Ltd to review its business records. At the visit, Epem Ltd maintained that all of its supplies were exempt as the treatments were for underlying medical conditions and improved the clients' wellbeing. HMRC disagreed and issued VAT assessments for the periods from 1 May 2007.

6. Epem requested a review of that decision. On 2 December 2013 the review upheld the assessments, concluding that Epem had not provided any evidence that their services were capable of being exempt medical services and, as such were to be treated as standard rated for VAT purposes. On 23 December 2013, Epem Ltd appealed the review decision (including the decision to compulsorily register the company for VAT) to this Tribunal. On 22 January 2014 HMRC issued an amended Belated Notification Penalty, which was appealed to HMRC by Epem on 4 February 2014.

7. Whilst the appeal against registration was stayed pending the decision in another appeal which was, eventually, withdrawn, HMRC issued assessments for the periods 11/12 to 05/14. These were issued on the basis of the information in Epem's accounts for the relevant years.

8. The issue for determination by this Tribunal is whether the services provided by Epem were exempt medical services within Schedule 9, Group 7, Item 1 Value Added Tax Act 1994 such that the level of its taxable supplies was below the VAT threshold. That is, were the services provided for the primary purpose of the protection, maintain or restoration of health of the individual concerned. The burden of proof in this is on Epem.

Relevant law

9. Article 132(1) of the VAT Directive (Council Directive 2006/112/EC) provides for the exemption of certain activities, including:

- (b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with

those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;

10. Schedule 9, Group 7 of the VAT Act 1994 provides for the exemption of (as relevant):

1 The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following—

(a) the register of medical practitioners . . .

(d) the register of qualified nurses . . . and nursing associates maintained under article 5 of the Nursing and Midwifery Order 2001

4 The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state-regulated institution.

Note 2 to Group 7: Paragraphs (a) to (d) of item 1 . . . include supplies of services made by a person who is not registered or enrolled in any of the registers or rolls specified in those paragraphs where the services are wholly performed or directly supervised by a person who is so registered or enrolled.

Submissions and discussion

11. Mr Shiell considered that the European Court of Justice (ECJ) decision in *Skatteverket v PFC Clinic AB* (Case C-91/12) (“*PFC Clinic*”) supported his contention that the services provided by Epem should be regarded as exempt.

12. The ECJ held, in that case, that Article 132(1)(b) and (c) must be interpreted as meaning that supplies of services such as plastic surgery and other cosmetic treatments fall within the concepts of ‘medical care’ and ‘the provision of medical care’ where those services are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health (para 39). The health problems covered by exempt transactions under art 132(1)(b) and (c) of the VAT Directive may be psychological (para 33). The subjective understanding that the person who undergoes plastic surgery or a cosmetic treatment has of it is not decisive in determining whether that intervention has a therapeutic purpose.

13. The court provided more detail (para 29), noting that services whose purpose is to treat or provide care for persons who, as a result of an illness, injury or a congenital physical impairment, are in need of plastic surgery or other cosmetic treatment may fall within the concept of ‘medical care’ in art 132(1)(b) of the VAT Directive and ‘the provision of medical care’ in art 132(1)(c) thereof respectively. The court confirmed that where the surgery (or treatment) is for purely cosmetic reasons it cannot be covered by that concept.

Clinic status

14. Mr Shiell contended that the clinic was improving the quality of people’s lives, in a similar way to doctors or dermatologists working in private hospitals, whose services were VAT exempt. He considered that the same VAT treatment should apply to services provided by Epem as they were the same or similar to the services provided in hospitals.

15. I note, however, that the VAT Directive distinguishes between transactions undertaken in hospitals (and similar regulated environments) and those undertaken elsewhere. The ECJ in *PFC Clinic* makes it clear that services undertaken outside of a regulated environment must amount to “medical care” in order to be VAT exempt.

16. Medical care in this context is overseen by the Care Quality Commission (CQC) and providers must be registered with CQC. The Epem clinic was not registered with CQC. Mr Shiell explained that they had approached CQC for registration but had been advised by letter that they were not providing regulated services and so were not able to register. Mr Shiell accepted that, as Epem was not CQC registered, it was not a state-regulated institution, and, as it is not a hospital, the services of Epem could not be exempt under Item 4 of Group 7 of Schedule 9 VATA 1994 (nor Article 132(1)(b) of the VAT Directive).

17. It is notable that the CQC considered that Epem was not providing regulated services. The CQC is the regulatory body for health and social care in England. Schedule 1 of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 sets out regulated activities, which are within the remit of the CQC and in respect of which a provider must register with CQC. These include the provision of treatment for a disease, disorder or injury by or under the supervision of a health care professional, or a team which includes a health care professional.

18. Although not definitive, the fact that CQC considered that Epem were not provided regulated services suggests that the clinic was not providing medical care within the context of art 132 of the VAT Directive.

Medical practitioners

19. Mr Shiell's evidence was that the treatments were all undertaken by, or supervised by, relevant medical practitioners. No details of the specific practitioners and their qualifications was provided to the Tribunal.

20. I note from *PFC Clinic* that "the fact that services such as those at issue in the main proceedings are supplied or undertaken by a licensed member of the medical profession or that the purpose of such services is determined by such a professional may influence the assessment" as to the exempt nature of the services but, correspondingly, it is not determinative.

21. It follows therefore that, even if the details of the practitioners had been provided to confirm that the services were supplied or determined by a relevant medical professional, it would not mean that the services must be VAT exempt. The key question is whether the services amount to "medical care" and "the provision of medical care".

Clinic services

22. Mr Shiell stated that the clinic provided laser treatments, varicose vein treatments, minor surgical procedures, medical device treatments and chemical peels. Laser treatments were used to treat warts, verrucae, in-growing toenails, vascular lesions, plantar fasciitis, scars, fungal nails, and hirsutism. Varicose veins were treated both with laser and by injection. The minor surgical procedures included the removal of scars, milia, various keratosis, naevi, lesions. Botox was provided as a treatment for excessive sweating, headaches and migraine and facial dystonic movements. Chemical peels were used to treat conditions such as active, melasma, hyper pigmentation and photo ageing skin.

23. Mr Shiell's view was that customers came to the clinic for medical treatment. He contended that, otherwise, all services fell within the exemption because customers were assessed when they first sought treatment. Customers seeking Botox were asked, for example, whether they had headaches as Botox is a treatment for issues such as headaches and excessive sweating. Hair removal was sought by some patients who were transitioning from male to female. Mr Shiell considered that only a small proportion of customers sought treatment for purely cosmetic reasons and he stated that the clinic would refuse to provide treatment if they could not establish a clinical indication for the treatment. He also mentioned

that some patients seeking tattoo removal were doing so because they wanted to improve their job prospects, to working in industries where visible tattoos were not permitted. This latter explanation was not, I consider, indicative of the service of tattoo removal being “medical care” in such cases.

24. HMRC noted that the Epem clinic website listed the following treatments and descriptions:

- “Botox - the anti-wrinkle treatment - “The fountain of youth”
- Wrinkle Fillers - pump up the skin giving a youthful complexion
- Facial Implants - next generation tissue rejuvenation
- Peels - 4 different chemical peels to suit different needs
- Active skin care - bespoke creams for post treatment
- Acne treatment - tailored dependent on age and severity
- Skin lesion treatment - for unsightly skin blemishes
- Stretch mark removal - for all parts of the body, male and female
- Thread vein removal - for face and body, also known as sclerotherapy
- Hair removal - for face and body, for all unwanted hair
- Tattoo removal - effective course of treatments to purge the skin area
- Mesotherapy - dissolve cellulite-causing bands and tighten the skin
- VelasMOOTH - new generation of treatment for cellulite and body sculpting
- Facial Thread Lift - The latest in “minimally invasive” facelifting
- Isologen - the first and only natural collagen process
- Skin Regeneration - a dramatically different, clinically proven treatment
- Sling Tightening - clinically approved Titan treatment”

25. On the website, the clinic described itself as “one of the foremost authorities in the UK and Europe in the field of medico beauty” and as bridging the gap between beauty salon and cosmetic surgery. HMRC contended that the description, of both the clinic and its treatments, indicated that a substantial proportion of Epem’s supplied services related to procedures carried out for cosmetic purposes rather than for medical care. The submitted that most of the conditions described (wrinkles, cellulite, tattoos) are not generally considered to be diseases or health disorders and services related to them could not be regarded as treatment of disease or health disorders.

26. Mr Shiell contended that the website list of services was not determinative, and the website also stated that the clinic provided “medical grade treatments”. He contended that website description did not mean that the services were beauty treatments and reiterated that the clinic was treating medical problems. He said that patients were advised by their GPs to go to the clinic for treatments; Mr Shiell stated that GPs rarely specifically referred the patient to a private clinic because the GP would be responsible for the referral, but he considered that GPs would provide recommendations. The clinic staff would observe the patients and see how they were reacting, to determine whether they needed the treatment for psychological reasons.

27. Mr Shiell submitted that Epem was clearly not providing beautician services. He considered that the procedures were clinical treatments to treat disease and not cosmetic

treatments, as he contended that cosmetic treatments made no lasting change or difference to the patient.

28. I consider that this contention may explain some of the dispute between the parties; it was not particularly clear why Mr Shiell took this view, but I consider that cosmetic surgical treatments cannot be said to make no lasting change or difference to a patient - a person who has a benign naevus (mole) removed has clearly undergone a treatment which makes a lasting physical change and difference. However, where the mole is benign and is being removed because the patient simply does not like it, the service will not be for the treatment of a health disorder (per *PFC Clinic*). Dissatisfaction with appearance does not automatically mean that the patient has a health disorder.

29. It is, obviously, possible that in some cases a benign physical condition (such as a mole) may cause clinical psychological problems for a patient. In such a case, treatment of the physical condition may form part of the overall treatment for the psychological condition. Mr Shiell's view that that the clinic was treating issues which were distressing to patients and affecting their quality of life. He considered that patients would not come to the clinic if the relevant condition was not causing a problem. The clinic would ask patients about the problems which the condition to be treated was causing.

30. Mr Shiell accepted that the clinic did not have any specialist psychiatric/psychological practitioners. He considered that GPs could undertake any psychiatric examinations required and that the medical training of the staff at the clinic enabled them to make these assessments.

31. Although Mr Shiell was of the view that the majority of patients attended the clinic because their condition was affecting their mental health, I do not consider that this means that the clinic must be considered to be providing entirely exempt services.

32. The ECJ in *PFC Clinic* noted that the terms used to specify the exemptions in Article 132 of the VAT Directive must be interpreted strictly, as they constitute exceptions to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality, so that the exemptions have their intended effect.

33. Whilst the ECJ noted that "it does not necessarily follow that the therapeutic purpose of a service must be confined within a particularly narrow compass" [at 26]), that comment does not mean that a very wide interpretation can be taken either. The ECJ also noted that whether a treatment has a therapeutic purpose (in this context)" is a medical assessment [which] must be based on findings of a medical nature which are made by a person qualified for that purpose" (at [35]).

34. Epem did not provide any evidence as to any medical assessments made by staff, although these were said to have been requested by HMRC during the enquiry. Mr Shiell said that the staff at the clinic maintained a history sheet, an exam sheet, details of aftercare and follow-up procedures. By the date of the hearing no records remained available from the relevant periods, as the records cannot be retained for more than ten years.

35. Mr Shiell said that Epem would have provided this information to HMRC if they had asked for it. HMRC contended that they had asked for evidence of the VAT status of the supplies, but this had never been provided. He had provided HMRC and the Tribunal with photographs showing patients before and after treatment but these only show an outcome - they do not demonstrate that all procedures undertaken by Epem were undertaken for a therapeutic purpose such that they could be considered to be medical care. Mr Shiell also

provided copies of the guidelines issued by the National Institute for Health and Care Excellence which he considered set the gold standard for treatment. Again, these do not demonstrate that the services provided by the clinic were, in every case, medical care.

36. Reviewing the information available to the Tribunal, and particularly the correspondence between the parties, it appears that Epem's responses to HMRC correspondence fail to provide any requested information. HMRC's requests for evidence do not include a specific request for copies or example of medical evidence but I consider that this is because Epem had failed to provide the initial request for information as to the proportion of services which were carried out as a result of GP referrals; Epem's responses to HMRC were simply to say that their services were all medical services which were exempt for VAT purposes (some of the responses refer to the services being zero-rated, but it was accepted that this was intended to refer to the services being exempt). Without even a breakdown of sources of income, I consider that there was no particular opportunity to request further details, such as medical records, in support of such a breakdown.

37. I do not consider that Mr Shiell's oral evidence as to the nature of the supplies is sufficient, without documentary support, to establish that the supplies of the clinic were entirely VAT exempt. Indeed, in the hearing, Mr Shiell accepted that some of the treatments provided by the clinic would be standard-rated and thought that this would be perhaps 10 to 15% of the services provided. He had not analysed the figures so could not be more precise.

Conclusion

38. Considering all of the evidence, I find therefore that the Epem clinic did make standard-rated supplies of services. Whilst it may have made some VAT-exempt supplies as well, there was no evidence before me on which I could determine the extent of any such exempt supplies. Mr Shiell's estimate in the hearing is not enough to make such a determination. The burden of proof is on the taxable person, Epem, to show that it made exempt services and the proportion of such services. In the absence of such evidence, the general rule applies and the services are to be treated as standard rated (see *PFC Clinic* at [23]).

39. Epem's financial statements made it clear that their turnover was in excess of the VAT threshold and so, in the absence of any evidence to support the level of exempt supplies, the business exceeded the VAT threshold.

40. Accordingly, I find that Epem have not discharged the burden of proof upon them to show that they should not be VAT registered and their appeal is DISMISSED.

41. In closing, I would add that I consider that Mr Shiell was clear that his intention was that Epem's services should improve people's lives; none of the above should be taken to mean that I did not believe him in this regard. However, for the reasons set out above, that intention is not sufficient to mean that the services can be regarded as VAT exempt and that Epem should not have been VAT registered.

TO APPLY FOR PERMISSION TO APPEAL

42. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 12th JULY 2023